

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN KELLY,

Defendant and Appellant.

A123350

(San Francisco County
Super. Ct. Nos. 203628, 2342185)

John Kelly (appellant) appeals the trial court's order revoking his probation and sentencing him to two years in state prison. Appellant's counsel has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and requests that we conduct an independent review of the record. Appellant was informed of his right to file a supplemental brief and did not file such a brief. Having independently reviewed the record, we conclude there are no issues that require further briefing, and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On July 26, 2006, a complaint was filed charging appellant with several counts of domestic violence and assault against Dan Lewis Doughty. On August 8, 2006, appellant pled guilty to assaulting Doughty with force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)¹). The remaining counts were dismissed and on August 29, 2006, appellant was sentenced to three years of probation, subject to various terms

¹ All further statutory references are to the Penal Code unless otherwise stated.

and conditions, including requirements that he stay 150 yards away from Doughty and obey all laws.

On November 15, 2007, while appellant was on probation, a second complaint was filed charging appellant with corporal injury upon Doughty (§ 273.5, subd. (a), count 1), assault with force likely cause great bodily injury upon Doughty (§ 245, subd. (a)(1), count 2), grand theft from Doughty (§ 487, subd. (c), count 3), and disobeying a family court protective order (§ 273.6, subd. (a), count 4). A protective order pending trial was issued requiring appellant to stay 150 yards away from Doughty. (2CT 4)~

On November 30, 2007, appellant pled guilty to count 1 of the second complaint. Pursuant to a plea agreement, he was placed on three years probation, subject to various terms and conditions, including a requirement that he have no personal or third-party contact with Doughty. Probation in the first case was revoked and reinstated, and the stay-away order remained a condition of probation in that case as well.

On July 3, 2008, a motion to revoke probation in both cases was filed. At a contested probation revocation hearing, Keone Holt testified that on July 1, 2008, at about 5:30 p.m., he was near the intersection of Castro and Market Streets in San Francisco. He was saying goodbye to a friend and giving the friend a hug when he saw a man he identified in court as appellant push another man to the ground and walk away with a push cart. The push was not “very hard,” but “it was enough force to push someone to the ground.” The man, whose arm was in a cast, landed on his back. The man was motionless and “no one seemed to be doing anything,” so Holt called 911. Holt asked the man if he needed help, but the man’s eyes were closed and he did not move or respond. “A few minutes, maybe two [minutes],” passed before the man made any kind of movement or opened his eyes. When the man woke up, he said, “He has my stuff. He has my cart.” Holt noticed that the man’s eyes were bloodshot and watery and that he appeared to be intoxicated.

Maura Duffy testified she is a senior investigator at the San Francisco District Attorney’s Office and has been an investigator there for 13 years. As part of her duties,

she was asked to locate a man named Dan Doughty and to serve him with a subpoena for the probation revocation hearing. She testified she mailed a certified letter to the P.O. Box address that was listed on a police report as Doughty's address. She called a hospital "in the area where he is known to be." She drove around an area that Doughty is known to frequent and looked for him. She went to Mission Station where there are two officers who know Doughty and left an extra copy of the subpoena in case the officers saw him. She went to the Tenderloin AIDS Resource Center where he had gone for visits and was told he had not been seen there since February 2008 and had not been in communication with the center since April. She spoke to a San Francisco Police officer Matthew Dudley,² checked the jails to see if Doughty was in custody, "ran the CLETS" and "r[a]n rap sheets to see if he had any police contact," and called the sheriff's department. She went to the physical location where he receives his mail and noticed he had picked up his mail since she had sent him the letter. She testified she mailed the letter on August 20 and made other steps to locate him from August 28 to September 4.

On examination by defense counsel, Duffy testified she did not speak to officers Frasier or Montoya. She was aware Frasier and Montoya knew Doughty and that Frasier was the reporting officer in the case, but was not aware that Montoya was also a reporting officer. She testified she drove around the Castro area twice, on August 29 and September 3, and on both occasions went to two places in the area Doughty was known to frequent. She testified she did not ask any individuals on the street whether they knew Doughty. She testified she asked the representative at the P.O. Box to have Doughty contact her when he came to pick up his mail. She also called Doughty's telephone number twice but did not recall whether the number was in service and remembered not being able to leave a voice mail message for him.

The prosecutor asked the court to find Doughty to be legally unavailable. Defense counsel argued, "I don't think that there is sufficient evidence that she [Duffy] had used due diligence or that the prosecutor has used due diligence to locate the witness to

² Dudley was one of the officers who reported to the scene of the incident.

support a finding of unavailability.” The defense also filed a document entitled “Objection to hearsay evidence of unavailable declarant.” The trial court found Doughty was unavailable.

Dudley testified he was on duty on July 1, 2008, at 5:24 p.m., when he was dispatched to the area of Castro and Market Streets in San Francisco. When he arrived at about 5:35 p.m., he saw a man on the sidewalk. The man was “[f]earful, agitated, almost crying,” “[p]hysically shaking, his voice was kind of trembling, kind of cowering like.” He asked the man for his name, and the man responded his name was Dan Doughty. Doughty said that appellant, his partner of approximately six years, pushed him to the ground with two hands and fled. Doughty said he fell and hit his head on the sidewalk. Doughty’s face was “all black and blue,” apparently from a previous incident, although Dudley could not tell which injuries were new or old. Doughty refused to have an ambulance called. Dudley testified Doughty’s eyes were bloodshot and watery, his speech was slurred, he smelled of an alcoholic beverage, and he appeared intoxicated, although not “severely intoxicated.” Doughty was also unsteady on his feet. Dudley later found appellant a “[c]ouple blocks” away. Appellant “appeared disheveled, smelled of alcoholic beverage on his breath and his person,” his eyes were red, bloodshot and watery, and his speech was “[k]ind of slurred.” Over defense counsel’s objection, the trial court admitted Doughty’s statements to Dudley into evidence, noting they were admissible under Evidence Code sections 1370 and 1240.

The trial court found appellant in violation of probation in both cases and on September 26, 2008, sentenced appellant to two years in state prison in each case, to run concurrently.

DISCUSSION

We have reviewed the entire record and conclude there are no arguable issues that warrant further briefing. We discern no error in the denial of appellant’s request to exclude Doughty’s statements to Dudley. Evidence Code section 1370 provides in relevant part: “(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met: [¶] (1) The statement purports to

narrate, describe, or explain the infliction or threat of physical injury upon the declarant. [¶] (2) The declarant is unavailable as a witness pursuant to Section 240.^[3] [¶] (3) The statement was made at or near the time of the infliction or threat of physical injury. . . . [¶] (4) The statement was made under circumstances that would indicate its trustworthiness. [¶] (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.”

All of the conditions of Evidence Code section 1370 were met in this case. First, Doughty’s statements to Dudley described how he was injured. Second, Doughty was unavailable to testify. Although defense counsel argued the prosecution had not shown it “ha[d] used due diligence to locate [Doughty],” Duffy’s testimony relating to the efforts she made, including mailing a certified letter to Doughty’s P.O. Box address, trying to reach him by telephone, calling the local hospital, checking the jail, going to an AIDS resource center where he had gone for visits, contacting police officers, going to the location where he receives his mail, and driving around areas he was known to frequent, established due diligence. Third, Doughty made his statements on the day of the incident, shortly after it had occurred. Fourth, the statements were trustworthy, as they corroborated Holt’s testimony as to how the injury occurred, and there was no evidence of bias or any other motive for fabricating the statement. (See Evid. Code, § 1370, subd. (b) [“circumstances relevant to the issue of trustworthiness include, but are not limited to, the following: [¶] (1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested. [¶] (2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive. [¶] (3) Whether the statement is corroborated by evidence other than

³ Evidence Code section 240 provides in relevant part that “unavailable as a witness” means the declarant is “(5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court’s process.”

statements that are admissible only pursuant to this section”].) Fifth, the statements were made to a police officer.⁴

We also note that substantial evidence supports the trial court’s finding that appellant violated his probation in both cases. The evidence showed appellant violated orders requiring him to stay away from Doughty. It also showed he committed assault upon Doughty, pushing him to the ground with such force to cause Doughty to fall to the ground and strike his head.

Appellant was adequately represented by counsel at every stage of the proceedings. There was no sentencing error.

DISPOSITION

The judgment is affirmed.

McGuinness, P.J.

We concur:

Pollak, J.

Siggins, J.

⁴ Because we find no error in the admission of Doughty’s statements under the physical injury hearsay exception, we need not and do not decide whether the statements also qualified for admission under Evidence Code section 1240, which provides: “Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.”